

1 motion for summary judgment, arguing, as relevant here, that
2 Plaintiff had not presented sufficient evidence of Empire's
3 insolvency or fraudulent intent.¹ With respect to the former,
4 Empire contended that the only evidence of insolvency was contained
5 in an expert report by William Haegele (the "Haegele Report") that
6 was not based upon reliable scientific principles or methods, and
7 was therefore inadmissible. With respect to fraudulent intent,
8 Empire objected that the evidence put forth by Plaintiff was
9 inadmissible hearsay.

10 Notwithstanding Empire's objections, the Bankruptcy Court
11 considered the Haegele Report and denied Empire's motion for
12 summary judgment, finding that the Haegele Report created a triable
13 issue of fact with respect to Empire's insolvency at the time of
14 the allegedly fraudulent transactions. (Motion, Ex. 2 at 17-18.)
15 The Bankruptcy Court also considered, over Empire's hearsay
16 objections, e-mails and memos between Larry Day, one of Empire's
17 officers and Ken Orgen, an accountant, to conclude that Plaintiff
18 produced sufficient evidence "with respect to the badges of fraud"
19 to create a triable issue of fact regarding Empire's fraudulent
20 intent.

21 Empire now seeks leave of this Court to file an interlocutory
22 appeal the bankruptcy court's summary judgment order and rulings
23 regarding the admissibility of the Haegele Report and the Lay-Ogren
24 documents.

25 **II. Legal Standard**

26
27 ¹ The parties agree that insolvency is an essential element of
28 Plaintiff's preference and constructive fraudulent transfer claims.
The parties also appear to agree that insolvency is not necessary
to Plaintiff's intentional fraudulent transfer claims.

1 A district court may grant leave to appeal an interlocutory
2 order of a bankruptcy judge. 28 U.S.C. § 158(a)(3). In
3 determining whether to grant leave, district courts generally apply
4 the same standard that governs interlocutory appeals of civil
5 matters. In re Ahern Rentals, Inc., No. 12-CV-0676-LRH, 2013 WL
6 150489 at *3 (D. Nev. Jan. 14, 2013). Pursuant to 28 U.S.C. §
7 1292(b), districts look to (1) whether a controlling issue of law
8 is involved, (2) whether there is a “substantial ground for
9 difference of opinion,” and (3) whether an immediate appeal will
10 materially advance the termination of the litigation. 28 U.S.C. §
11 1292(b). Even where all of these elements are met, district courts
12 retain discretion to deny permission for interlocutory appeal.
13 Tsyn v. Wells Fargo Advisors, LLC, No. 14-cv-02552-LB, 2016 WL
14 1718139 at *3 (N.D. Cal. Apr. 29, 2016).

15 Although a question may be controlling so long as resolution
16 of the issue could materially affect the outcome of litigation,
17 Section 1292(b) typically will not apply to cases that turn “on
18 whether there is a genuine issue of fact or whether the district
19 court properly applied settled law to the facts or evidence of a
20 particular case.” Harris v. Vector Mktg. Corp., No. C-08-5198 EMC,
21 2009 WL 4050966, at *2 (N.D. Cal. Nov. 20, 2009) (quoting McFarlin
22 v. Conseco Services, LLC, 381 F.3d 1251, 1259 (11th Cir. 2004).
23 “Courts traditionally will find that a substantial ground for
24 difference of opinion exists where the circuits are in dispute on
25 the question and the court of appeals of the circuit has not spoken
26 on the point, if complicated questions arise under foreign law, or
27 if novel and difficult questions of first impression are presented.
28 Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010)

(internal quotation marks and citation omitted). “[J]ust because counsel contends that one precedent rather than another is controlling does not mean there is such a substantial difference of opinion as will support an interlocutory appeal.” Id. The party seeking leave bears the burden “of showing that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.” Fukuda v. Los Angeles County, 630 F. Supp. 228, 229 (C.D. Cal. 1986) (internal quotation and citation omitted).

III. Discussion

A. The Haegle Report

The question presented with respect to the Haegle Report, as Empire frames it, is “[o]n a motion for summary judgment, where the . . . only evidence of one of the essential elements is an expert report to which the nonmoving party objects on the grounds that it is not reliable, is it error for a bankruptcy court to . . . deny[] summary judgment without the court making a Daubert determination with respect to the reliability of the purported expert’s methodology?” (Mot. At 9:25-10:5.) So phrased, the question whether the issue is controlling is bound up with the question whether there is a substantial ground for difference of opinion. The answer is no.

To qualify as a controlling question of law for purposes of interlocutory appeal, the issue “must be stated at a high enough level of abstraction to lift the question out of the details of the evidence of facts of a particular case and give it general relevance to other cases in the same area of law.” Sateriale v. RJ Reynolds Tobacco Co., No. 2:09-CV-08394-CAS, 2015 WL 3767424, at *2

1 (C.D. Cal. June 17, 2015) (internal quotations and citations
2 omitted); see also McFarlin, 381 F.3d at 1259. Here, Empire seeks
3 to lift the issue out of the details of this particular case by
4 suggesting that the bankruptcy court held that an expert opinion
5 could defeat summary judgment even if that opinion did not meet the
6 Daubert test for admissibility.

7 Under Federal Rule of Evidence 702, trial courts have a
8 gatekeeping function regarding expert testimony. Daubert v.
9 Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 n.7 (1993).

10 Where "scientific, technical, or other specialized knowledge will
11 assist the trier of fact" to understand evidentiary or factual
12 issues, an expert witness who is qualified by "knowledge, skill,
13 experience, training, or education" may "testify thereto in the
14 form of an opinion or otherwise." Fed. R. Evid. 702. In addition,
15 Rule 702 requires that:

- 16 1) the testimony is "based upon sufficient facts or data";
17 2) the testimony is the "product of reliable principles and
18 methods"; and
19 3) the witness has "applied the principles and methods
reliably to the facts of the case."

20 Fed. R. Evid. 702. Courts must evaluate expert scientific
21 testimony for both relevance and reliability. The proponent of the
22 expert testimony has the burden of establishing that the relevant
23 admissibility requirements are met by a "preponderance of the
24 evidence." Daubert, 509 U.S. at 592 n.10 (citing Bourjaily v.
25 United States, 483 U.S. 171, 175 (1987)). Courts employ a flexible
26 inquiry tied to the facts of the particular case to make
27 determinations regarding the reliability of expert testimony.
28 Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999). The

1 focus should be "solely on principles and methodology, not on the
2 conclusions they generate." Daubert, 509 U.S. at 595; see also Fed.
3 R. Evid. 702 Adv. Comm. Note to 2000 Amdt. An expert's experience
4 alone can provide a sufficient foundation for expert testimony, so
5 long as the witness explains "how that experience leads to the
6 conclusion reached, why that experience is a sufficient basis for
7 the opinion, and how that experience is reliably applied to the
8 facts." Fed. R. Evid. 702 Advisory Committee Note to 2000 Amdt.

9 Empire bases its characterization of the bankruptcy court's
10 holding almost entirely upon footnote 15 to the 31-page memorandum
11 decision. Footnote 15, appended to the bankruptcy court's
12 discussion of the Haegele Report, states, "The Court is not making
13 any findings regarding the methodology used by Haegele (whether to
14 consider the actual sale price of Anaverde); only that Plaintiff
15 has presented sufficient evidence to create an issue for trial."
16 (Mot., Ex. 2 at 18:24.) Although that sentence, viewed in
17 isolation, might arguably support Empire's argument, such a narrow
18 reading mischaracterizes the bankruptcy court's position.

19 Nowhere in the bankruptcy court's decision is there any
20 suggestion that a Daubert analysis is unnecessary or that a party
21 presenting expert opinion need not satisfy Daubert or Rule 702.
22 Indeed, an examination of the transcript of oral argument
23 proceedings reveals that the bankruptcy court devoted substantial
24 attention to Daubert issues. The court engaged in an extensive
25 colloquy with counsel, spanning approximately thirty transcript
26 pages, regarding the admissibility of the Haegele Report.
27 (Plaintiff's Request for Judicial Notice, Ex. 20 at RJN 4003-4034.)
28 During that exchange, the court acknowledged its role as gatekeeper

1 for scientific evidence and responsibility for determining whether
2 the Haegele Report met the standard for admissibility. (RJN Ex. 20
3 at RJN 4010). Indeed, the court explicitly stated that the issue
4 with respect to the Haegele Report was whether "it is so flawed as
5 to be unreliable that it shouldn't suffice as evidence." (Id. at
6 RJN 4013:21-23.)

7 In response to that question, Plaintiff's counsel argued, in
8 part, that the "developer's approach" methodology employed by Mr.
9 Haegele was sound, as evinced by the fact that the methodology had
10 been accepted in another bankruptcy case and had only been rejected
11 in distinguishable eminent domain cases. Id. at RJN 4018, 4023-24.
12 The bankruptcy court stated, "I am ultimately agreeing with
13 [Plaintiff]. . . . [N]othing that's been shown to me, either in
14 oral argument or in the record, shows me that the methodology was
15 problematic to the extent that . . . I would not take the [Haegele
16 Reort] in to establish an issue of fact." Id. at 4018.

17 The Daubert colloquy did not end there. Empire's counsel
18 argued each of the Rule 702 factors in turn, and the bankruptcy
19 court explicitly stated that the first two factors, relevance and
20 sufficiency of the data, were met. Id. at 4019. With respect to
21 the reliability of the Haegele Report's principles and methods, the
22 bankruptcy court opined that that was "not one of [Empire's]
23 stronger arguments" before explaining that the court was not
24 convinced that Empire's "lawyer's presentation of why the numbers
25 are wrong . . . is enough for me to find that the report is not
26 something I can rely on as creating an issue of fact. . . . [T]he
27 only thing I'm looking at is [whether] the methodology was . . .
28 done erroneously." Id. at 4019:24-25; 4027:13-17; 4029:2-4.

1 In the context of this extensive discussion at argument, it is
2 clear that the bankruptcy court's statement in footnote 15 to the
3 written decision denying summary judgment, stating that "[t]he
4 Court is not making any findings regarding the methodology used by
5 Haegele" was not, as Empire suggests, a pronouncement that the
6 Daubert analysis is irrelevant or unnecessary. Rather, footnote 15
7 is a restatement of the bankruptcy court's explanation at oral
8 argument that "[a]t trial, [Empire] may very well be able to tear
9 [Mr. Haegele] apart, and I'm not . . . suggesting otherwise right
10 now, but here . . . the issue is is [the Haegele Report] so flawed
11 as to be unreliable that it shouldn't suffice as evidence." Id. at
12 4013:15-23.

13 In sum, here there is no abstract, high level question whether
14 a court may deny summary judgment based solely upon expert
15 testimony that has not passed Daubert muster, let alone a question
16 whether there is a substantial ground for difference of opinion,
17 because the bankruptcy court never took that position. The
18 bankruptcy court's reiteration in footnote 15 that admissibility
19 determinations have no bearing on credibility determinations at
20 trial cannot be fairly read as a refusal to conduct a Daubert
21 analysis. The court engaged in a lengthy discussion with counsel
22 regarding Empire's Daubert objections, and overruled them.
23 Although Empire may disagree with the bankruptcy court's
24 evidentiary rulings, such determinations do not constitute
25 controlling questions of law on a disputed legal issue that would
26 merit the exceptional relief of an interlocutory appeal.

27 B. Empire's Hearsay Objections
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1 The bankruptcy court determined that "a series of e-mails"
2 between one of Empire's officers, Larry Day, and tax accountant Ken
3 Ogren, as well as a memorandum by Ogren, "provided in connection
4 with the depositions of Ken Ogren and Larry Day[,] " were sufficient
5 to create a triable issue of fact regarding Empire's fraudulent
6 intent. (Mot., Ex. 2 at 10.) Here, Empire argues that this
7 evidence, as well as other business records, including checks, bank
8 deposits, and journal or ledger entries, which were attached as
9 exhibits to a declaration from Plaintiff's counsel, are hearsay
10 improperly unauthenticated by counsel and are, therefore,
11 inadmissible.² (Motion at 9, 19.)

12 As with the Haegele Report, discussed above, Empire attempts
13 to present this hearsay issue as something more than a disagreement
14 with the bankruptcy court's evidentiary rulings. Empire frames the
15 question presented here as whether "it is error for a bankruptcy
16 court to admit unauthenticated evidence . . . or [whether] it is
17 sufficient for . . . counsel to attach unauthenticated documents to
18 his own declaration and promise to authenticate the evidence at
19 trial?" (Mot. at 9. See also Reply at 7:15-19 ("[T]he question
20 here is broad: that is, whether a Bankruptcy Court can deny summary
21 judgment based on unauthenticated and inadmissible documents. That
22 question not only controls this case, it is of critical importance
23 in many others. The Trustee[, and by extension, the bankruptcy

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26 ² It is somewhat unclear whether all of this evidence is
27 contained within the e-mails and memorandum to which the bankruptcy
28 court referred. See Reply at 10 ("[T]he documents attached to the
declaration of the Trustee's counsel were the only things cited by
the Bankruptcy Court . . . as evidence of intentional fraud . . .
.").

1 court,] argues that he does not need to provide admissible evidence
2 to defeat summary judgment. EPI contends that he does.").

3 As with the Haegele Report, Empire's characterization of the
4 bankruptcy court's decision sets up a straw man, the analysis of
5 which necessarily combines the "controlling question of law" and
6 "substantial ground for difference of opinion" factors of the
7 interlocutory appeal inquiry. Nowhere in its written decision or
8 at oral argument does the bankruptcy court suggest that, as a
9 general legal principle, unauthenticated hearsay evidence is
10 admissible or that inadmissible evidence can defeat a motion for
11 summary judgment. Empire cannot, therefore, possibly demonstrate
12 the existence of a substantial ground for disagreement, let alone
13 one that implicates a circuit split or a difficult issue of first
14 impression. See Couch, 611 F.3d at 633 (9th Cir. 2010).
15 To the extent the bankruptcy court may have erred in its
16 determination that the records upon which it based its fraudulent
17 intent finding were properly authenticated and admissible, either
18 because they are not hearsay or are subject to some exception, such
19 potential error presents no more than a question whether the "court
20 properly applied settled law to the facts of evidence of a
21 particular case."³ Harris 2009 WL 4050966 at *2. Such questions
22 are generally ill-suited to interlocutory review. Id.

23
24 ³ Contrary to Empire's suggestion, the bankruptcy court did
25 not state that the Trustee's counsel's declaration was alone
26 sufficient to authenticate the Day-Ogren e-mails or the memorandum.
27 The bankruptcy court's written decision emphasizes that the
28 documents were "provided in connection with the depositions of Ken
Ogren and Larry Day." (Mot., Ex. 2 at 10:8.) To the extent Empire
contends that that provenance presents other, distinct
admissibility concerns, those issues also present no more than a
question regarding the proper application of well-settled law.

1 Furthermore, even if Empire had successfully shown that a
2 highly abstract, controlling issue of law is involved, and that a
3 substantial ground for disagreement exists, it has failed to meet
4 its burden to show that an immediate appeal will materially advance
5 the termination of this litigation. Even if the bankruptcy court
6 did err in finding certain evidence properly authenticated by
7 counsel's declaration, Plaintiff represents that at least some of
8 that evidence of fraudulent intent, including general ledgers and
9 bank records, was provided by Empire as part of the discovery
10 process, proffered by Empire itself in connection with its summary
11 judgment, or referenced in Empire's interrogatory responses.⁴
12 (Opposition at 22-23.) Thus, even if the bankruptcy court had
13 stated and followed some novel and erroneous legal principle, it
14 appears that certain evidence of fraudulent intent could have been
15 admitted on alternative grounds, and that resolution of the
16 question presented by Empire in Empire's favor would not
17 necessarily result in a grant of Empire's summary judgment motion.

18 As with the Haegele Report, Empire's motion for interlocutory
19 appeal of the bankruptcy court's admission of certain business
20 records clothes a straightforward disagreement with the bankruptcy
21 court's evidentiary rulings in the guise of a sweeping,
22

23 ⁴ To the extent Empire argues in reply that Plaintiff does not
24 explain why exclusion of the business records would have no effect
25 on the litigation, the court disagrees. (Reply at 10:7-9.)
26 Although it is somewhat unclear whether the universe of evidence to
27 which Plaintiff refers overlaps completely with the evidence cited
28 in the bankruptcy court's written order, Plaintiff also explains
potential alternative grounds for admissibility of the evidence
that Empire claims the bankruptcy court improperly admitted and
relied upon. It remains, of course, Empire's burden to demonstrate
that interlocutory appeal will materially advance the termination
of the litigation. 28 U.S.C. § 1292(b).


1 controversial statement of law that the bankruptcy court simply
2 never made. Even if the bankruptcy court had adopted such a
3 position, Empire has failed to demonstrate that interlocutory
4 review of that error would necessarily result in a grant of summary
5 judgment in Empire's favor or otherwise materially advance the
6 termination of these proceedings. Accordingly, leave to file an
7 interlocutory appeal of the bankruptcy court's order denying
8 Empire's motion for summary judgment is not warranted.

9 **IV. Conclusion**

10 For the reasons stated above, Empire's Motion for Leave to
11 Appeal is DENIED.

12
13 IT IS SO ORDERED.

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15 Dated: December 15, 2017


DEAN D. PREGERSON
United States District Judge